A

Syed Ibrahim & Co (applying as a legal firm) v Trans Fame Offshore Sdn Bhd (under judicial management) (formerly known as Transfame Sdn Bhd) (BAP Resources Sdn Bhd & Ors, interveners)

B

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-28JM-22–12 OF 2021
NADZARIN WOK NORDIN J
C 16 JUNE 2022

Companies and Corporations — Judicial management — Judicial managers — Respondent was placed under judicial management — Judicial management order had expired — Applicant creditor applied for second judicial management
D *application — Second intervener creditor applied for appointment of different judicial manager — Whether second judicial management application could be made — Whether s 405 of the Companies Act 2016 had been made out on a 'more probable than not' basis — Companies Act 2016 ss 404, 405, 406, 407, 408,*
E *410, 411 & Ninth Schedule*

Statutory Interpretation — Interpretation Acts 1948 and 1967 — s 17A — Second judicial management application – Interpretation of ss 404, 405 and 406 of Companies Act 2016 — Whether second judicial management application
F *could be made*

In the previous originating summons ('OS 21') by one of the creditors of the respondent, the respondent was ordered by the court to be placed under judicial management ('the JMO') of the judicial manager known as Datuk
G Mohd Afrizan. The applicant herein was one of the creditors recognised under the statement of proposal ('the SOP') in OS 21. Considering that the expiry date of the JMO was on 9 December 2021, the applicant had filed the present originating summons ('the OS') on 28 September 2021 pursuant to ss 404, 405, 406, 407, 408, 410, 411 and the Ninth Schedule of the Companies Act
H 2016 ('the CA') for, inter alia, the order that the respondent be placed under judicial management of a judicial manager ('the second judicial management application'). Pending the disposal of the OS, Datuk Mohd Afrizan was appointed as the interim judicial manager. It ought to be noted that under the SOP, the repayment to the creditors were to be made in three tranches and
I during the subsisting of the JMO, Datuk Mohd Afrizan had managed to make the payment of the first tranche. Aside from the OS, the second intervener in this action had filed an application to appoint another nominee, being one Andrew Heng, as the judicial manager of the respondent ('para (c) of encl 22'). The issues to be determined in the present action were: (a) whether the second

judicial management application could be made; and (b) whether s 405 of the CA had been made out on a 'more probable than not' basis.

Held, allowing the OS with costs of RM10,000 to be paid by the first and second interveners jointly to the applicant, and dismissing para (c) of encl 22 with costs of RM2,500 to be paid by the second intervener to both the judicial manager and the applicant:

(1) The court had considered s 17A of the Interpretation Acts 1948 and 1967 in deciding the issue of whether the second judicial management application could be made. A reading of both ss 404 and 405(1) and (2) of the CA showed that both provisions were silent as to whether parliament had intended the Act to restrict any applications for a judicial management to be restricted to a one-time application only. If the Parliament had intended to do so, it would surely have provided a section to that effect. Further, s 406 of the CA also did not bar a fresh application for judicial management being made. That being said, in any judicial management applications, including subsequent judicial management applications in particular, such applications ought to be made bona fide and with full and frank disclosure of all the material facts pertaining to the company, and it was for the applicant to satisfy the burden of proof on a balance of probabilities to the court that the requirements under the Act had been not only complied with but also the criteria therein fulfilled (see paras 11–12, 14 & 17).

(2) The second intervener by his conduct of filing encl 22 and seeking the prayer therein indicated that the second intervener supported the second judicial management application. Further, based on the summary of cash movement filed via the affidavit of Datuk Mohd Afrizan, the court found that the respondent's cash balance as of 25 February 2022, with some of it was recovered by Datuk Mohd Afrizan himself, was amounted to RM8,822,913.75 and on top of that, even after the expiry of the JMO, there was cash inflow in the sum of RM197,910.23. Based on the evidence, the court held that there was still a chance of the probability of rehabilitating the company or of preserving all or part of its business as a going concern (see paras 21–22 & 25).

(3) Based on the facts, Datuk Mohd Afrizan had conducted himself with sufficient efficiency as the judicial manager in OS 21 and as the interim judicial manager herein and to contend that he was inefficient to recover the debts from the respondent's substantial debtors was not supported by the facts because the court had found that Datuk Mohd Afrizan had filed an originating summons to seek a refund of the RM5,150,000 bank guarantee made out to one of the respondent's debtor, MMHE and had set aside legal costs to pursue the said claim as per the SOP. Further, he had engaged in prolonged negotiations between the respondent and its

A debtors which led to the late payment for the second tranche distribution. He had also discovered the possible recovery of RM900,000 from a project which was not claimed by the previous directors and/or the management of the respondent prior to the JMO in OS 21. Based on these findings, the court held that the second intervener had not made out a case for the appointment of Andrew Heng as the judicial manager and there was no prejudice against the second intervener should Datuk Mohd Afrizan be appointed the judicial manager in this OS. Thus, in the circumstances, the court held that Datuk Mohd Afrizan was the better and more suitable candidate to continue to be the judicial manager in the OS herein to ensure the continuity as well as smooth process of the work done by him in OS 21 (see paras 26–28).

[Bahasa Malaysia summary

Dalam saman pemula yang difailkan sebelum ini ('SP21') oleh salah seorang pemiutang responden, responden telah diperintahkan oleh mahkamah untuk diletakkan di bawah pengurusan kehakiman ('PPK') pengurus kehakiman yang dikenali sebagai Datuk Mohd Afrizan. Pemohon di sini adalah salah seorang pemiutang yang diiktiraf di bawah penyata cadangan ('PC') dalam SP21 tersebut. Memandangkan tarikh luput PPK tersebut adalah pada 9 Disember 2021, pemohon telah memfailkan saman pemula ini ('SP') pada 28 September 2021 menurut ss 404, 405, 406, 407, 408, 410, 411 dan Jadual Kesembilan Akta Syarikat 2016 ('AS tersebut') untuk, antara lain, perintah supaya responden diletakkan di bawah pengurusan kehakiman pengurus kehakiman ('permohonan pengurusan kehakiman kedua'). Sementara menunggu pelupusan SP ini, Datuk Mohd Afrizan telah dilantik sebagai pengurus kehakiman sementara. Perlu diingatkan bahawa di bawah PC tersebut, pembayaran balik kepada pemiutang hendaklah dibuat dalam tiga peringkat dan semasa PPK masih berjalan, Datuk Mohd Afrizan telah berjaya membuat pembayaran peringkat pertama. Selain daripada SP ini, pencelah kedua dalam tindakan ini telah memfailkan permohonan untuk melantik seorang lagi penama, iaitu seorang Andrew Heng, sebagai pengurus kehakiman responden ('perenggan (c) lampiran 22'). Isu-isu yang perlu ditentukan dalam tindakan ini ialah: (a) sama ada permohonan pengurusan kehakiman kedua boleh dibuat; dan (b) sama ada s 405 AS tersebut telah dibuktikan atas dasar 'more probable than not'.

Diputuskan, membenarkan SP dengan kos sebanyak RM10,000 yang perlu dibayar oleh pencelah pertama dan kedua secara bersama kepada pemohon; dan menolak perenggan (c) lampiran 22 dengan kos sebanyak RM2,500 yang perlu dibayar oleh pencelah kedua kepada pengurus kehakiman dan pemohon:

(1) Mahkamah telah menimbangkan s 17A Akta Tafsiran 1948 dan 1967 dalam memutuskan isu sama ada permohonan pengurusan kehakiman kedua boleh dibuat. Bacaan kedua-dua ss 404 dan 405(1) dan (2) AS

menunjukkan bahawa kedua-dua peruntukan tersebut tidak menyatakan sama ada parlimen berhasrat agar AS tersebut untuk menyekat mana-mana permohonan pengurusan kehakiman supaya dihadkan kepada sekali sahaja. Jika Parlimen berhasrat untuk berbuat demikian, sudah pasti ia akan menyediakan seksyen untuk tujuan tersebut. Selanjutnya, s 406 AS juga tidak menghalang permohonan baharu untuk pengurusan kehakiman dibuat. Walaupun begitu, dalam mana-mana permohonan pengurusan kehakiman, termasuk secara khususnya permohonan pengurusan kehakiman yang berikutnya, permohonan sedemikian hendaklah dibuat secara bona fide dan dengan pendedahan penuh dan terus terang ke atas semua fakta material yang berkaitan dengan syarikat, dan pemohon bertanggungjawab untuk memenuhi beban pembuktian atas imbangan kebarangkalian kepada mahkamah bahawa keperluan di bawah AS tersebut bukan sahaja telah dipatuhi malahan kriteria di dalamnya dipenuhi (lihat perenggan 11–12, 14 & 17).

(2) Pencelah kedua melalui tindakannya memfailkan lampiran 22 dan memohon permohonan di dalamnya menunjukkan bahawa pencelah kedua menyokong permohonan pengurusan kehakiman kedua. Selanjutnya, berdasarkan ringkasan pergerakan tunai yang difailkan melalui afidavit Datuk Mohd Afrizan, mahkamah mendapati baki tunai responden setakat 25 Februari 2022, dengan sebahagian daripadanya telah diperoleh sendiri oleh Datuk Mohd Afrizan, berjumlah RM8,822,913.75 dan selain itu, walaupun selepas tamat tempoh PPK tersebut, terdapat aliran masuk tunai dalam jumlah RM197,910.23. Berdasarkan keterangan, mahkamah berpendapat bahawa masih terdapat peluang kebarangkalian untuk memulihkan syarikat atau mengekalkan semua atau sebahagian perniagaannya sebagai usaha berterusan (lihat perenggan 21–22 & 25).

(3) Berdasarkan fakta, Datuk Mohd Afrizan telah bertindak dengan kecekapan yang mencukupi sebagai pengurus kehakiman dalam SP21 dan sebagai pengurus kehakiman sementara di sini dan untuk menegaskan bahawa beliau tidak cekap dalam mendapatkan semula hutang daripada penghutang-penghutang yang banyak berhutang dengan responden adalah tidak disokong oleh fakta kerana mahkamah telah mendapati bahawa Datuk Mohd Afrizan telah memfailkan saman pemula untuk mendapatkan bayaran balik jaminan bank bernilai RM5,150,000 yang dibuat kepada salah seorang penghutang responden, MMHE dan telah mengenepikan kos guaman untuk meneruskan tuntutan tersebut seperti yang telah ditetapkan di dalam SOP. Tambahan pula, beliau telah mengadakan rundingan yang panjang antara responden dan penghutang-penghutangnya yang menyebabkan pembayaran lewat untuk pengagihan bayaran peringkat kedua. Beliau juga telah menemui kemungkinan mendapatkan semula RM900,000

daripada satu projek yang mana jumlah tersebut tidak dituntut oleh pengarah terdahulu dan/atau pengurusan responden sebelum PPK dalam SP21. Berdasarkan dapatan-dapatan ini, mahkamah memutuskan bahawa pencelah kedua gagal membuktikan kes bagi pelantikan Andrew Heng sebagai pengurus kehakiman dan tiada prejudis terhadap pencelah kedua sekiranya Datuk Mohd Afrizan dilantik sebagai pengurus kehakiman dalam SP ini. Justeru, dalam keadaan tersebut, mahkamah memutuskan Datuk Mohd Afrizan adalah calon yang lebih baik dan sesuai untuk terus menjadi pengurus kehakiman dalam SP di sini bagi memastikan kesinambungan serta kelancaran proses kerja yang dilakukan olehnya dalam SP21 (lihat perenggan 26–28).]

Cases referred to

Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd and another suit [2019] 8 MLJ 473; [2018] 10 CLJ 412, HC (refd)

Pengusaha, Tempat Tahanan Perlindungan Kamunting, Taiping & Ors v Badrul Zaman bin PS Md Zakariah [2018] 12 MLJ 49, FC (folld)

Gold Coast Morib International Resort Sdn Bhd and another case, Re [2021] MLJU 126, HC (refd)

Spacious Glory Sdn Bhd v Coconut Three Sdn Bhd (previously known as Nexgram Land Sdn Bhd) [2020] MLJU 1827; [2020] 1 LNS 1617, HC (refd)

Legislation referred to

Companies Act 2016 ss 366, 404, 405, 405(1), (2), 406, 407, 408, 409, 410, 411, 414, 421(2), Ninth Schedule

Interpretation Acts 1948 and 1967 s 17A

Mak Lin Kum (with Layyin Teh) (Syed Ibrahim & Co) for the applicant in JM22.
Kennie Ang (Ang & Lau) for the respondent/interim judicial manager.
Noor Akhza (Aqeeb & Co) for the first intervener.
Tay Yi Kuan (Roshan) for the second intervener.
Matthew Van Huizen (Joseph & Partners) for the intervener (Ben Line Agencies (M) Sdn Bhd).

Nadzarin Wok Nordin J:

ORIGINATING SUMMONS

[1] In the originating summons dated 28 September 2021 (OS) in encl 1, the applicant has applied pursuant to ss 404, 405, 406, 407, 408, 409, 410 and 411 and the Ninth Schedule of the Companies Act 2016 for, inter alia, the order that the respondent be placed under judicial management of a judicial manager.

[2] The grounds in support of the OS are briefly as follows:

(a) the respondent is currently placed under judicial management via an order dated 11 December 2020 ('JMO') obtained through an Originating Summons No WA-28JM-21–09 of 2020 ('OS 21'), which was filed by one of its creditors, Neptune Asia Services Sdn Bhd;

(b) the JMO expires on 9 December 2021;

(c) the applicant is a creditor of the respondent recognised in the statement of proposal in OS 21 tabled to at the meeting of creditors by a judicial manager of the respondent on 31 July 2021;

(d) the proposals made in the statement of proposal demonstrated the ability of the respondent to maintain a 'going concern' status or alternatively, to work towards a more advantageous realisation of the respondent's assets than in a winding up for the benefit of its creditors but realistically, the completion of such steps will exceed the term of the JMO;

(e) the statement of proposal recognises 265 creditors. The statement of proposal was approved on 31 July 2021;

(f) the statement of proposal proposes a repayment plan to creditors in three tranches, whereby two tranches were at the time of proposal, expected to be received during the term of the JMO;

(g) the first tranche is fixed at a 10% pay out and the same has been fulfilled. The second tranche and third tranche distributions are yet to be determined and will be contingent upon the probability of recovery of funds and/or claimable losses from contract claims, project owners and third parties who caused losses to TFO;

(h) on 19 November 2021, the applicant made an enquiry with the judicial manager in OS 21 with regards to the pay out of the second tranche distribution;

(i) vide a letter from the solicitors of the judicial manager in OS 21 dated 30 November 2021, the judicial manager in OS 21 explained that there are potential funds to be recovered from project owners which are intended to be utilised to pay for the second tranche distribution. The recovery process will take time and will go beyond the expiry of the JMO;

(j) the recovery of proceeds from projects and proceedings represents the cash inflow of the respondent which is vital for the respondent and for the pay out of its creditors;

(k) an occurrence of winding up, as set out in Part 13.1 of the statement of proposal, will be very disadvantageous to creditors as any returns to creditors are not expected to exceed RM0.10 for every RM1 owed to creditors;

(l) the expiry of the JMO in OS 21 eventually means that the respondent and its assets and business will be returned to the directors and shareholders in the absence of any other order made;

(m) there is a complete lack of commitment from the current directors or shareholders of the respondent to ensure the best interests of these 265 creditors upon the upliftment of the JMO in OS 21;

(n) the respondent has come this far where the judicial manager in OS 21 has successfully managed to make a pay-out of 10% to the creditors of the respondent and is working towards the second and third tranche and therefore, the fate of these 265 creditors should not be placed at risk in the hands of the respondent's directors or shareholders; and

(o) if the respondent's current state of affairs is allowed to continue in the hands of its current shareholders and directors, the rights and interests of these 265 creditors will be severely prejudiced.

[3] The applicant had submitted, inter alia, that:

(a) it has the standing to apply for the prayers in the OS as it is a creditor of the respondent;

(b) the respondent's insolvency is not in dispute;

(c) the respondent was placed under a judicial management order on 11 December 2020 (JMO) via Originating Summons No WA-28JM-21–09 of 2020 (OS 21) by one Neptuna Asia Services Sdn Bhd;

(d) a statement of proposal (SOP) was voted on pursuant to OS 21 wherein 94.82% of the creditors had voted in favour of the SOP, thereby achieving the 75% required statutory majority approval under s 421(2) of the Companies Act 2016;

(e) the SOP recorded a total recognised debt of RM119,468,051.08 from a total admitted claim of 265 creditors of the respondent and that the respondent is currently sitting in a negative shareholders fund position where its total liability outweighed its total assets and shareholders equity;

(f) the judicial manager had in the statement of proposal proposed a repayment plan to creditors in three tranches, where:

(i) the first tranche is fixed at a 10% pay out and has been distributed to the creditors on 10 September 2021. The first limb of the proposal has been achieved; and

(ii) the second tranche and third tranche distributions are yet to be determined and will be contingent upon the recovery of funds and/or claimable losses from contract claims, project owners and

third parties who caused losses to the respondent.

(g) the payment of the first tranche was made notwithstanding the respondent is in an insolvent state;

(h) the creditors of the respondent are currently anticipating the pay-out of the second tranche and third tranche distributions

(i) On 19 November 2021, the applicant made an enquiry with the judicial manager in OS 21 with regards to the receipt of the second tranche distribution;

(j) by a letter from the solicitors of the judicial manager dated 30 November 2021, the judicial manager explained that there are potential funds to be recovered from project owners which are intended to be utilised to pay for the second tranche distribution and he is currently engaging in negotiation with the respondent's project owners for an amicable settlement;

(k) realistically, the second tranche distribution pay-out is expected to occur after the JMO expires the JMO had expired on 9 December 2021; and

(l) the current OS and OS 21 shows a trend that none of the directors or shareholders of the respondent are taking any responsibilities to ensure the interest of these 265 creditors are protected.

BACKGROUND

[4] On 9 December 2021, this High Court on OS 21 had granted an order (9 December 2021 order) that pending disposal of the OS herein all assets, documents, books and accounts of the respondent be preserved and held by the JM in OS 21 ie Datuk Mohd Afrizan. The said 9 December 2021 order also stated that the shareholders of the respondent were not to assume management control of the respondent and all powers under s 414 and the Ninth Scheduleof the Companies Act 2016 shall continue to apply.

[5] On 10 February 2022, Datuk Mohd Afrizan was appointed as the interim judicial manager of the respondent by this court in the OS herein upon the application of the applicant herein.

[6] There is also before this court a notice of motion in encl 22 (encl 22) to amongst others appoint another nominee, being one Andrew Heng, as the judicial manager of the respondent.

[7] The third respondent has at the hearing of the OS informed this court that they were supporting the OS.

A COURT'S FINDINGS

[8] Under the law, the starting point for a judicial management application is ss 404 and 405(1) and (2) of the Companies Act 2016 which are set out below as follows:

B

Section 404

An application for an order that a company should be placed under a judicial management and for an appointment of a judicial manager may be made to the Court by the company or its creditor if the company or its creditor considers that:

C

(a) the company is or will be unable to pay its debts; and

(b) there is a reasonable probability of rehabilitating the company or of preserving all or part of its business as a going concern or that otherwise the interests of creditors would be better served than by resorting to a winding up.

D

Section 405

(1) Where a company or its directors, under a resolution of its members or the board of directors, or a creditor, including any contingent or prospective creditor or all or any of those parties, together or separately, makes an application under section 404, the Court may make a judicial management order in relation to the company if:

E

(a) the Court is satisfied that the company is or will be unable to pay its debts; and

F

(b) the Court considers that the making of the order would be likely to achieve one or more of the following purposes:

(i) the survival of the company, or the whole or part of its undertaking as a going concern;

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(ii) the approval under section 366 of a compromise or arrangement between the company and any such persons as are mentioned in that section;

(iii) a more advantageous realisation of the company's assets would be effected than on a winding up.

H

[9] It is to be observed that read collectively and as a whole, the express words in the above said ss 404 and 405(1) and (2) of the Companies Act 2016 was framed by Parliament for the benefit of the company ie in this case the respondent, in that the company or its creditors have to consider under s 404 that there is a reasonable probability of rehabilitating the company or of preserving all or part of its business as a going concern or that otherwise the interests of creditors would be better served than by resorting to a winding up, whilst under s 405 the court must consider the court considers that the making of the order would be likely to achieve one or more of the following purposes:

I

(i) the survival of the company, or the whole or part of its undertaking as a going concern;

(ii) the approval under s 366 of a compromise or arrangement between the company and any such persons as are mentioned in that section; and

(iii) a more advantageous realisation of the company's assets would be effected than on a winding up.

[10] In *Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd and another suit* [2019] 8 MLJ 473; [2018] 10 CLJ 412 (HC), Wong Chee Lin JC (as she then was) had held that:

> [21] It is clear from the Hansard, that the judicial management was introduced to rehabilitate companies that are under financial distress and to reduce the number of cases where companies are wound up.
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> Datuk Liang Teck Meng (Simpang Renggam):
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> > minta Menteri Perdagangan Dalam Negeri, Koperasi dan Kepenggunaan menyatakan berapakah jumlah kes syarikat yang digulungkan sepanjang tempoh 2010 hingga 2014 dan apakah peranan kerajaan dalam menangani kes syarikat yang digulungkan?
>
> Timbalan Menteri Perdagangan Dalam Negeri, Koperasi dan Kepenggunaan (Dato' Paduka Ahmad Bashah bin Md Hanipah): ...
>
> > Jumlah syarikat yang digulungkan sepanjang tempoh 2010 hingga bulan Ogos 2014 adalah sebanyak 9,010. Dari jumlah tersebut sebanyak 3,396 syarikat telah digulungkan secara sukarela manakala sebanyak 5,614 syarikat telah digulungkan melalui perintah mahkamah. Kementerian Perdagangan Dalam Negeri, Koperasi dan Kepenggunaan prihatin berhubung keperluan memperkenalkan satu mekanisme untuk menyelamatkan syarikat- syarikat yang mengalami masalah kewangan. Namun masih boleh dipulihkan untuk beroperasi secara sedia kala.
> >
> > Dalam hal ini, Suruhanjaya Syarikat Malaysia yang merupakan agensi kementerian ini telah mengambil inisiatif untuk memperkenalkan beberapa mekanisme penyelamat korporat melalui pembaharuan yang sedang dilakukan kepada Akta Syarikat 1965. Mekanisme yang dicadangkan ini akan menjadi satu alternative kepada penggulungan atau pembubaran syarikat. Antaranya ialah pengurusan kehakiman ...

[11] The above judicial management regime is thus quite different from a liquidation scenario where the court essentially looks at the interest of the creditors per se which prevails over the interest of the company or its shareholders whereas in a judicial management proceedings, the court is concerned with amongst other things the probability of rehabilitating the company or of preserving all or part of its business as a going concern.

[12] I will now address the issue of whether a second JM application can be made. A reading of both the said ss 404 and 405(1) and (2) of the Companies Act 2016 shows that it is silent as to whether Parliament had intended the Companies Act 2016 to restrict any applications for a JM pursuant to the judicial management provisions to be restricted to a one time application only. Had Parliament intended to do so, it would surely have provided a section to that effect.

[13] In deciding on the above issue, I have taken into account s 17A of the Interpretation Acts 1948 and 1967 which provides that 'In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[14] I am therefore adopting the ratio of the Federal Court in *Pengusaha, Tempat Tahanan Perlindungan Kamunting, Taiping & Ors v Badrul Zaman bin PS Md Zakariah* [2018] 12 MLJ 49 where the Federal Court had stated that:

> In interpreting the provisions of an Act of Parliament, the trend now is to adopt such a construction as will promote the legislative intent or purpose underlying the provisions. This purposive approach has been given statutory recognition for the courts to adopt by virtue of s 17A on the Interpretation Acts 1948 and 1967. The Federal Court in *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v Dikim Holdings Sdn Bhd & Anor* [2002] 2 MLJ 11; [2002] 3 CLJ 69 and *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345; [1994] 4 CLJ 285 had adopted the purposive approach by making reference to the Parliamentary reports or Hansard as an aid to statutory interpretation in interpreting the provisions of Acts of Parliament. In that case, Haidar FCJ, in delivering the judgment of the court remarked: 'It will give statutory force to the courts to look the policy speech of the Minister or the promoter of the Bill in Hansard for the purpose of an aid to the interpretation of statutes'.

[15] That being said, any applications, including subsequent JM applications, under the judicial management provisions of the Companies Act 2016 must necessarily comply with all the requirements of the said Act as aforementioned. It also goes without saying that in any judicial management applications, including subsequent JM applications in particular, such applications must be made bona fide and with full and frank disclosure of all the material facts pertaining to the company, and it is for the applicant to satisfy the burden of proof on a balance of probabilities to the court that the requirements under the Companies Act 2016 have been not only complied with but also the criterias therein fulfilled. It will then be a question of deciding each case on the merits of the case before the court in the subsequent JM application based on a case to case basis whilst ensuring that at all times there has been no abuse of the court process in doing so.

[16] For the sake of completeness, I have also considered s 406 of the Companies Act 2016 which states:

> (1) A judicial management order shall remain in force for a period of six months from the date of the making of the order, unless the judicial management is otherwise discharged, but the Court may, on the application of a judicial manager, extend this period for another six months subject to such terms as the Court may impose.

[17] In *Re Gold Coast Morib International Resort Sdn Bhd and another case* [2021] MLJU 126 this court had considered and decided the effect of s 406 of the Companies Act 2016 and held:

> [29] Under s 406(1) of the Companies Act 2016, the duration of the JMO is stated to be:
>
> > (1) A judicial management order shall remain in force for a period of six months from the date of the making of the order, unless the judicial management is otherwise discharged, but the Court may, on the application of a judicial manager, extend this period for another six months subject to such terms as the Court may impose.
>
> [30] By the word 'shall' in the said s 406(1) of the Companies Act 2016, it is clearly parliament's intent to make it mandatory that such a JMO is to be in force or in other words, valid for a period of only six months from the date of the making of the order. Such JMO will from the natural and ordinary meaning of the words in the said sub section be, in this courts view, immediately terminated on such date unless the JMO is either:
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> (a) discharged or
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> (b) extended for a period of another 6 months on the application of a judicial manager
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> [31] On the trite principle that parliament does not legislate in vain, and by adopting a purposive approach as to the intent of Parliament, I hold that by an examination of the language used in s 406(1) of the Companies Act 2016 and Division 8 Sub Division 2 of the Companies Act 2016 as a whole, the intent of parliament is to end the judicial management if the purpose of the JMO being to achieve the survival of the company as a going concern and/or that a more advantageous realisation of the company's assets would be effected than on a winding up cannot be achieved within the initial six month period under s 406(1) of the Companies Act 2016.

[18] From the decision in the above said case, I hold that although the initial judicial management order in OS 21 has expired on 9 December 2021, and thus the said judicial management order in OS 21 is brought to an end, I hold that the said s 406 of the Companies Act 2016 does not bar a fresh application for judicial management being made subject to the conditions this court has mentioned above.

[19] This court now has to consider whether s 405 of the Companies Act 2016 has been made out on a 'more probable than not' basis ie in the words of the said section 'that the making of the order would be likely to achieve one or more of the following purposes' as decided by this court in *Spacious Glory Sdn Bhd v Coconut Three Sdn Bhd (previously known as Nexgram Land Sdn Bhd)* [2020] MLJU 1827; [2020] 1 LNS 1617:

> [28] The term 'likely' has not been defined in the Companies Act 2016 but the term 'likely' has been held in the UK in the case of *AA Mutual International Insurance Co Ltd Re* [2004] EWHC 2430 (Ch) to mean the applicant to demonstrate on a balance of probabilities that it is 'more probable than not' that this criterion will be fulfilled. I respectfully adopt the same definition for the purposes of defining the term 'likely' under s 405 of the Companies Act 2016.

[20] It was argued by the applicant that the payment of the first tranche by the JM in OS 21 shows that the interest of the creditors have been better served than on a winding up and that the threshold to satisfy the granting of a JMO under ss 404 and 405 of the Companies Act 2016 have been met. With respect, I do not entirely agree with this proposition as the court is still obliged to look into the entire circumstances before it to determine if indeed a more advantageous realisation of the company's assets would be affected than on a winding up in the matter herein.

[21] From the case before me, it is undisputed that:

(a) the OS herein is a second attempt to place the respondent under a JMO albeit by different creditors of the respondent;

(b) the SOP under the previous JMO vis a vis OS 21 had obtained more than the 75% required statutory majority approval under s 421(2) of the Companies Act 2016; and

(c) only the first tranche of payment pursuant to the approved SOP had been paid out by the said previous JMO vis a vis OS 21 and that the second tranche of payment was delayed.

[22] In coming to my decision herein I have also considered that encl 22 which was filed by the second intervener had amongst others proposed another nomination to be the JM, ie Andrew Heng instead of the applicant's proposed nominee, Dato Mohd Afrizan. I do agree with learned counsel for the applicant the second intervener by his conduct of filing the said encl 22 and seeking the said prayer indicates that the second intervener supports JM application herein.

[23] I have also observed from the summary of the cash movement averred to in the affidavit of the interim judicial manager herein in encl 33 that the cash

balance of the respondent as at 25 February 2022 is RM8,822,913.75 with some of it recovered by the said the interim judicial manager as the previous JM in OS 21, I have also noted that the cash inflow even after expiry of last JMO ie between 10 February 2022 to 25 February 2022 was the sum of RM197,910.23.

[24] From the documents before me, in particular the affidavit of the interim judicial manager in encl 33, it is my finding that he has averred:

(a) that RM8,822,913.75 can be paid to creditors, with a potential of 5% payout if the JM is ordered;

(b) there is a possibility of recovery of RM43m from the AGRU Project with Muhibbah Engineering;

(c) there is also a possibility of recovery of RM900,000 from the Kikeh/Sepawi Project from PTT Exploration and Production (PTTEP);

(d) the Petronas Licence to the respondent has been renewed for the period until 2023;

(e) the respondent has successfully bid for the Petronas Myanmar project for the sum of RM90,047;

(f) the respondent stands a fair chance to bid for contracts of short, medium term as sub contractor where the company's expertise can be utilised; and

(g) the permanent and contract staff of the respondent have been reduced and its branch offices in Miri and Kota Kinabalu have been closed.

[25] I have viewed the same against the objections raised by the first and/or second interveners to the OS which is essence consist of:

(a) there are substantial debtors of the respondent being MMHE and Muhibah Engineering;

(b) that Datuk Mohd Afrizan was unable to perform the necessary actions under the SOP to recover the debts owed to the respondent wherein the second tranche of payment would not have been an issue; and

(c) it will take time for the respondent to recover its debts and to restructure the company.

[26] I hold that based on the evidence before me, there is still a chance of the probability of rehabilitating the company or of preserving all or part of its business as a going concern due to the following factors:

(a) RM8,822,913.75 can be paid to creditors, with a potential of 5% payout if the JM is ordered;

A (b) the possibility of recovery of RM43m from the AGRU Project with Muhibbah Engineering;

(c) the possibility of recovery of RM900,000 from the Kikeh/Sepawi Project from PTT Exploration and Production (PTTEP);

B (d) the Petronas Licence to the respondent has been renewed for the period until 2023; and

(e) the respondent has successfully bid for the Petronas Myanmar project for the sum of RM90,047 during the time of the previous JMO in OS 21.

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[27] I further hold that Datuk Mohd Afrizan has from the facts before me conducted himself with sufficient efficiency as the JM in OS 21 and as the Interim JM herein and that to contend that he was inefficient to recover the debts from the respondent's substantial creditors is in my view not supported D by the facts which I have evaluated as I find that the said Datuk Mohd Afrizan had filed an application in OS to seek a refund of the RM5,150,000 bank guarantee made out to MMHE and has set aside legal costs to pursue the said claim as per the SOP.

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[28] It is also my finding that Datuk Mohd Afrizan has engaged in prolonged negotiations between the respondent and its debtors which led to the late payout for the second tranche distribution and that he has discovered the possible recovery of RM900,000 from the Kikeh/Sepawi Project from PTT F Exploration and Production (PTTEP) which was not claimed by the previous directors and/or the management of the respondent prior to the JMO in OS 21. On this I find that the second intervener has, with respect, not made out a case for the appointment of Andrew Heng and I find no prejudice will befall the second intervener should Datuk Mohd Afrizan be appointed the JM in this G OS.

[29] Thus, in the circumstances before me, I hold that Datuk Mohd Afrizan is the better and more suitable candidate to continue to be the judicial manager in the OS herein for the above reasons and to ensure the continuity as well as H smooth process of the work done by him in OS 21.

[30] I hereby:

(a) grant order in terms of paras 1 to 8 of the OS in encl 1 with costs of I RM10,000 to be paid by the first and second intervener jointly herein to the applicant; and

(b) hereby dismiss para (c) of encl 22 with costs of RM2,500 to be paid by the said second intervener to both the judicial manager and the applicant severally.

Originating summons allowed with costs of RM10,000 to be paid by first and second interveners jointly to applicant; para (c) of encl 22 dismissed with costs of RM2,500 to be paid by second intervener to both judicial manager and applicant.

Reported by Dzulqarnain Ab Fatar